DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Washington, D.C. 20201

May 18, 1987

MEMORANDUM

TO : Dr. Everett R. Rhoades
Director, Indian Health Services
Public Health Service

FROM : Ronald B. Guttmann, Chief
Business Law Branch
Business and Administrative Law Division

SUBJECT: Cook Inlet Region, Inc., Draft Proposal for Replacement of the Alaska Native Medical Center at Anchorage, Alaska; Request for Opinion 87-1

By memorandum dated January 16, 1987, you requested our advice whether the Indian Health Service (IHS) presently has authority to enter into a proposed agreement with the Cook Inlet Region, Inc. (CIRI), for the construction and lease of the new Alaska Native Medical Center in Anchorage, Alaska (ANMC). Under this proposed agreement, CIRI would build and own a replacement facility, located on Federal land and to be used as the new ANMC under lease to the IHS for 20 years purportedly pursuant to the authority of section 704 of the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. §1674. At the end of this time period, the ownership of the facility would be transferred by the tribe to the IHS. 1/ Although CIRI has referred to this proposed

---

1/ CIRI's proposal raises a legal question whether, under the law of Alaska, it is legally possible for CIRI to construct a building on government land and yet remain the owner of the building. As a general rule of fixtures law, a building on land is considered to be part of the realty. 35 Am. Jur.2d §78 (1976 ed.) and Tiffany on Real Property, Vol. 2, Ch. 11, Section IV (3rd ed., 1939). We researched this point under Alaska law and were unable to find any clear statement or rule. However, we are aware that several general property law treatises recognize an exception to this general rule of fixtures law can be made through a written agreement of the parties. If IHS decides to consider further CIRI's proposal, this issue will have to be explored.

...angement as a lease, its proposal, summarized above, indicates ...t it is something other than a traditional lease.

...ur memorandum concludes by asking for our suggestions for ...egislative changes, if we determine that the IHS presently has ...o authority to enter into such an arrangement.

Subsequently on March 26, 1987, IHS provided us with additional information from CIRI. We have reviewed this new material, which is basically a financial projection for CIRI's proposal and provides for an estimated total final cost for the facility of $92 million with an approximate annual lease payment of $13,500,000 for a total cost of $270 million over the life of the lease. This additional material, however, does not provide any new information relevant to the legal question IHS has raised.

CIRI's financial proposal, however, does raise certain legal problems. The proposal presumably would require the IHS to commit itself to an agreement prior to actual construction. However, the final lease costs are to be based on the actual construction costs, at no risk to the developer or financer. And, it should be pointed out the $92 million does not include the costs of "planning, design, moving,"etc., which could be very substantial. In our opinion, this method could expose the IHS to a potential Antideficiency Act violation, 31 U.S.C. §1341, if there were a shortfall of available funds to meet our obligations under the agreement.

Our opinion, which has been coordinated with and concurred in by the Public Health Division, is that the IHS's leasing authority under IHCIA does not provide the substantive authority necessary to enter into a "lease purchase contract" such as that proposed by CIRI and that IHS presently has no other legal authority to support such an arrangement. Therefore, in accordance with your request, we are including with our opinion, suggestions for appropriate legislation.

Legal Analysis

IHS's authority under section 704 of IHCIA, 25 U.S.C. §1674, to lease real property from Indian tribes, provides:

> Notwithstanding any other provision of law, the Secretary is authorized, in carrying out the purposes of this chapter, to enter into leases with Indian tribes for periods not in excess of 20 years. Property leased by the Secretary from an Indian tribe may be reconstructed or renovated by the Secretary

pursuant to an agreement with such Indian tribe. 2/

On its face, section 704 of the IHCIA specifically authorizes only traditional leasing. In our opinion this leasing is clearly distinct from CIRI's proposal for the construction and lease of a new ANMC, with ultimate transfer of ownership of the facility to the IHS at the end of the lease term.

The legislative history of the leasing authority in IHCIA is not very helpful. We found nothing to indicate that the leasing authority provided to the IHS could be construed to authorize the construction, lease and ultimate purchase of the leased facility. In fact, the legislative history of IHCIA reveals that Congress intended that "[s]uch leasing would be in lieu of Federal construction." House Report 94-1026, Part I, pp. 122-123, 94th Congress, 2nd Sess. (1976).

IHS's current Appropriations Act is also not very helpful. That Act, contained in the Joint Resolution Making Continuing Appropriations for FY 1987, P.L. 99-591, provides funds for IHCIA purposes, including leasing, and also funds for construction, major repairs and improvements of IHS facilities. It does not, however, authorize the use of funds for the construction, lease and purchase, or "lease purchase" of facilities.

If IHS were to accept CIRI's proposal relying on its IHCIA leasing authority and appropriations, it would, in effect, be using funds appropriated for leasing to construct and purchase a building. We believe that such an action, without a specific statutory basis, violates a fundamental rule of appropriations law that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. §1301(a). Further, such an arrangement may also violate 41 U.S.C. §12, which requires express specific appropriations for the construction of any public building. 38 C.G. 392 (1958).

We believe it is noteworthy that the General Services Administration (GSA), which has clear legislative authority for leasing, constructing and purchasing of facilities for the government, has on a number of occasions been provided with specific temporary authority to enter into arrangements such as that proposed by CIRI, referred to in these statutes as "lease

---

2/ There may be a question concerning the IHS's authority to enter into long-term leases without specific, prior Congressional approval. However, for purposes of this opinion it is not necessary to answer this question.

purchase contracts." See The Public Buildings Purchase Contract Act of 1954, P.L. 83-519, codified at 40 U.S.C. §356, and the Public Buildings Amendments of 1972, P.L. 92-313, codified at 40 U.S.C. §602a. It is our opinion that Congress provided GSA with specific lease purchase contracting authority because it did not believe GSA already had such authority within GSA's existing lease, purchase and construction authority. Likewise, we believe that in order for the IHS to accept CIRI's proposal, it should have specific substantive authority for such an action, along with funds appropriated for such a purpose. At the very minimum, IHS would require an appropriations act which makes clear that the funds may be used for a "lease purchase" arrangement under the IHCIA. 3/

Suggestions for an IHS Legislative Proposal

If IHS decides to seek new legislative authority for lease purchase contracting, we suggest that it take into consideration the specific content of the previously referenced GSA temporary lease purchase contracting authorities. Title 40 U.S.C. §§356 and 602a each provided GSA with specific lease purchase contracting authority subject to various conditions and limitations. These statutes require a finding by GSA that such actions are in the best interests of the United States, provide limitations on the costs of such contracts, specify the funds available for such undertakings (funds available for the payment of rent) and require that no specific appropriations shall be made for such purposes until GSA obtains specific Congressional approval of each undertaking, by means of a prospectus. We also note that the legislative history of these statutes clearly states that direct Federal construction is the most economical method of meeting government building needs, but recognizes that because of budgetary constraints, construction is not always possible and lease purchase contracts are a cheaper means of acquiring facilities than leasing. See, 1954 U.S. Code Cong. and Admin. News, pp. 2637-2638 and the 1972 U.S. Code Cong. and Admin. News, p. 2373. Given the seemingly high cost of the CIRI proposal, we suggest that any legislation proposed by IHS must clearly demonstrate why lease purchase is being used as opposed to direct Federal construction.

Even the above referenced specific legislative authorities provided to GSA, however, apparently did not resolve all of GSA's problems. In Fiscal Years 1985, 1986 and 1987, GSA's annual appropriations acts again provided GSA with a form of lease

---

3/ Our research has failed to uncover any other IHS authority that would authorize it to enter into a "lease purchase contract" arrangement such as that proposed by CIRI.

purchase contract authority, by allowing GSA to use funds available for the payment of rent for the purpose of leasing buildings erected on land owned by the United States. 4/ However, our understanding, through informal discussions with GSA legal counsel, is that the Office of Management and Budget (OMB) has taken the position that in order for GSA to enter into a lease purchase contract it must obligate all of the funds for the lease purchase contract in the initial year of the agreement, rather than on a yearly basis over the entire period of the agreement. In IHS's case, this could necessitate an appropriation for at least $270 million or specific authority to otherwise fund the proposal. GSA legal counsel believes that the bottom line is that, since OMB has not apportioned any funds for this purpose, OMB is apparently completely opposed to the use of lease purchase contracts as a method of Federal building acquisition. 5/

We suggest that, in light of OMB's position regarding GSA's lease purchase authority, that would require GSA to obligate all of the funds for the lease purchase contract in the initial year of the agreement, it is especially important that any IHS legislation clearly provide IHS with the authority to obligate funds each year to cover the lease purchase contract costs for that year. Further, in order to avoid potential Antideficiency Act problems, we believe that the IHS's legislative proposal must also provide sufficient financial flexibility to deal with any shortfall of funds resulting from a proposal such as CIRI's, which provides that actual lease costs will be finalized only after construction.

4/ GSA's lease purchase authority for FY 1985 is found in its FY 1985 appropriations act, section 6 of H.R. 5798, p. 39 of the Treasury, Post Office and General Government Appropriations Act of 1985, as amplified by comments on p. 13 of the Conference Report on H.R. 5798, H. Report No. 98-993, 98th Cong. 2nd Session, September 6, 1984, both of which were enacted into law by P.L. 98-473. GSA's FY 1986 authority is found in section 6 of H.R. 3036, p. 32 of the Treasury and Postal Service Appropriations Act of 1986, enacted into law by P.L. 99-190. For FY 1987, GSA's lease purchase authority is found in section 3 of P.L. 99-591, the Joint Resolution for Continuing Appropriations for FY 1987.

5/ GSA legal counsel also advised us that, in light of OMB's position, GSA is presently exploring the possibility of including "purchase options" in its leases, based on two Comptroller General decisions that allow for such inclusions under certain conditions. 38 Comp. Gen. 227 (1958) and 38 Comp. Gen. 703

(Footnote Continued)

We hope that this discussion of GSA's lease purchase contracting authorities and the issues arising therefrom proves useful to the IHS in exploring potential IHS legislation.

If we can be of further assistance, please let us know.

cc: Joel Mangel, OGC
Duke McCloud, OGC
Patrick McBride, OGC

(Footnote Continued)
(1959). IHS may wish to explore this issue further with GSA to see whether this theory may prove useful to the IHS.